Principles of Competition Law

Lecture Title: EU Merger Control

Diploma in Law (Malta)

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RECAP: European Competition Law Pillars

Pillar 2
Abuse
of Dominance

Pillar 1
Anti-Competitive
Agreements

Pillar 3
Regulating
Mergers / Acquisitions

Introduction

- The Merger Regulation lays down the conditions under which the European Commission or the NCAs have jurisdiction over "**concentrations**". Generally concentrations with an "EU dimension" fall to be investigated by the Commission, whereas those without an EU dimension fall to be investigated by the NCAs in accordance with their domestic merger control rules
- As an exception to this general rule: there are **referral procedures** under which parties can engage in pre-notification contacts with the authorities with a view of reallocating jurisdiction between the Commission and the NCAs
- Concentrations falling under the EU Merger Regulation must in principle be notified to the Commission and generally cannot be implemented unless and until the Commission declares the transaction compatible with the internal market – "**standstill obligation**"
- All EU Member States have national merger control laws, with the exception of Luxembourg. Of these national merger control regimes, all require **mandatory notification** of qualifying transactions to the relevant authorities, and most require suspension (standstill obligation) of completion pending a clearance decision, with provisions for harsh sanctions (including substantial fines) in case of default. Moreover, each merger authority works to its own timetable

Introduction

- There are **no sector-specific** merger control rules at the EU level. Such legislation may, however, exist at the national level eg., the telecoms and media sectors

- Where a merger **does not** meet the EU Merger Regulation criteria, **national merger** control may apply for those transactions that qualify for investigation under the national laws of individual Member States. Eg., see Malta Control of Concentrations Regulations

- Generally, therefore, transactions which are subject to notification to, and clearance by, the Commission under the EU Merger Regulation are **not subject to parallel merger inquiries** under the national merger control provisions of Member States

What is the Merger legislation?

- Merger control legislation at the EU level is set out in **Council Regulation (EC) 139/2004 on the control of concentrations between undertakings** (the Merger Regulation) and in Commission Regulation (EC) No 1033/2008 implementing the Merger Regulation (the Implementing Regulation)

- They have been complemented with various interpretative notices, guidelines, and best practice rules, such as the:

- Commission consolidated jurisdictional notice
- Case Referral Notice
- Simplified Procedure Notice
- Remedies Notice
- Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (Horizontal Merger Guidelines)
- Non-horizontal Merger Guidelines
- Ancillary Restraints Notice

- These may be found at:

http://ec.europa.eu/competition/mergers/legislation/legislation.html

- The Commission has also published "Best Practice Guidelines" which concern the relationship between case team and parties/third parties during the procedure (pre-notification contacts, meetings, provision of documents)

Why do Companies merge?

- **Synergy**: by combining business activities, performance will increase and costs will decrease
- **Growth**: the acquiring company has the opportunity to grow market share by acquiring a pre-existing business. Usually, these are called horizontal mergers
- **Increase Supply-Chain Power**: by buying out one of its suppliers or one of its distributors, a business can eliminate a level of costs; vertical mergers
- **Diversification**: the reduction of risk through investment decisions. If a large, conglomerate firm thinks that it has too much exposure to risk because it has too much of its business invested in one particular industry, it may buy a business in another industry. That would provide a measure of diversification for the acquiring firm. In other words, the acquiring firm no longer has all its eggs in one basket
- **Improved financing**: If a company is in trouble financially, it may look for another company to acquire it. The alternative may be to go out of business or claim bankruptcy
- **Increasing capabilities:** from expanded research and development opportunities or more robust manufacturing operations. Similarly, companies may want to combine to leverage costly manufacturing operations

Why Merger Control?

- On the other hand, some combination may reduce competition in a market – usually by **creating or strengthening a dominant position**. The main aim of merger control is to prevent mergers leading to the creation or reinforcement of a dominant position and thus depriving consumers of benefits resulting from effective competition such as low prices, high-quality products, wide selection of goods and services, and innovation.
- Mergers may also impede effective competition by altering the market structure in such a way that companies on a relevant market are **more likely to coordinate and raise their prices**.
- Another detrimental effect to competition may be a **reduction of the companies' abilities and/or incentives to compete** which may result in higher prices or a lack of innovation.
- Therefore the most important goal of merger policy is to avoid the creation of a market structure that would significantly facilitate coordination of market behaviour between different market players. The focus is on the impact of mergers on **future competition** rather than on how competition has evolved in the past - Whether the benefits of the combination outweigh the adverse impact of the combination, if any
- Contrary to the ex post control of abusive market practices by dominant undertakings under Article 102 TFEU, EU ex ante merger control is designed to preclude undertakings from creating a dominant position (among others) which might in future enable them to abuse their market power to the detriment of consumers.

Why Merger Control (cont)?

- The assessment must take into account of likely future industry changes in order to assess properly the impact of a particular transaction

- Merger Control involves a market forecast of how competition will develop in the future. Factors considered by the Commission include:

- Actual and potential level of competition in the market & extent of barriers to entry into the market
- Degree of countervailing power in the market
- Likelihood that the combined parties would be able to significantly and sustainably increase prices/profit margins
- Extent of effective competition & likely to sustain in a market
- Extent to which substitutes are available or are likely to be available in the market
- Market share of the persons or enterprise in a combination, individually and as a combination

In the News…Commission approves acquisition of Momondo by Priceline (M.8416) (Horizontal)

i. Priceline operates online travel agents and travel comparison metasearch sites, under several brand names including booking.com, priceline.com, and agoda.com, whilst Momondo Group is primarily active in the operation of metasearch sites, under the brands Cheapflights and Momondo.

ii. The Commission's investigation found that: The companies' metasearch activities are largely geographically *complementary* in the EEA, as Priceline has limited activities in the Nordic countries, where Momondo has a strong market position. Conversely, in countries like Germany and Austria, Priceline's brands have a stronger market position and Momondo is weaker.

iii. The merged entity will be competing with several other global meta search operators, such as Skyscanner, Trivago, TripAdvisor, Google (through Google Hotels and Google flights), as well as by operators of smaller, regional or national, meta search sites.

In the News…Fines for providing incorrect or misleading information

i. The competition authorities do not only object to gun jumping, but also to the **provision of incorrect or misleading information** during a merger process. The Commission has imposed a EUR 110 million fine on Facebook in this context.

ii. By way of comparison: until that time the highest fine imposed by the Commission for such an offence had amounted to EUR 50,000.

iii. Facebook had allegedly provided the Commission with incorrect information on the acquisition of WhatsApp.

iv. During the merger process, Facebook claimed it was technically impossible to combine user information from Facebook and WhatsApp automatically.

v. However post transaction, WhatsApp announced that it would begin sharing user information with its parent company, admitting that personal details such as phone numbers and device information would now be used to target advertisements and improve products on Facebook.

In the News…Fines for Incorrect Information

Commissioner Vestager said that "Our merger assessment and decision-making can only be as good as the information that we obtain to support it. Accurate information is essential for the Commission to take competition decisions in full knowledge of the facts."

- The EC fined General Electric €52 million for providing incorrect information during the Commission's investigation under the EU Merger Regulation of GE's planned acquisition of LM Wind.
- GE notified its proposed acquisition of LM Wind. In this notification, GE stated that it did not have any higher power output wind turbine for offshore applications in development, beyond its existing 6 megawatt turbine. However, through information collected from a third party, the Commission found that GE was simultaneously offering a 12 megawatt offshore wind turbine to potential customers.

Forms of "Concentrations"

Article 3 of the Merger Regulation states that:

"Definition of concentration

1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

(a) the merger of two or more previously independent undertakings or parts of undertakings, or

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

…………

4. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b)."

Forms of “Concentrations”

M&As may be divided into three types:

- **Horizontal merger**: It happens when both companies are in the same line of business, which means they are usually competitors. Example: Disney bought LucasFilm. Both companies were involved in production of film, TV shows

- **Vertical merger**: This happens when two companies are in the same line of production, but stage of production is different. Example: Microsoft bought Nokia to support its software and provide hardware necessary for the smartphone

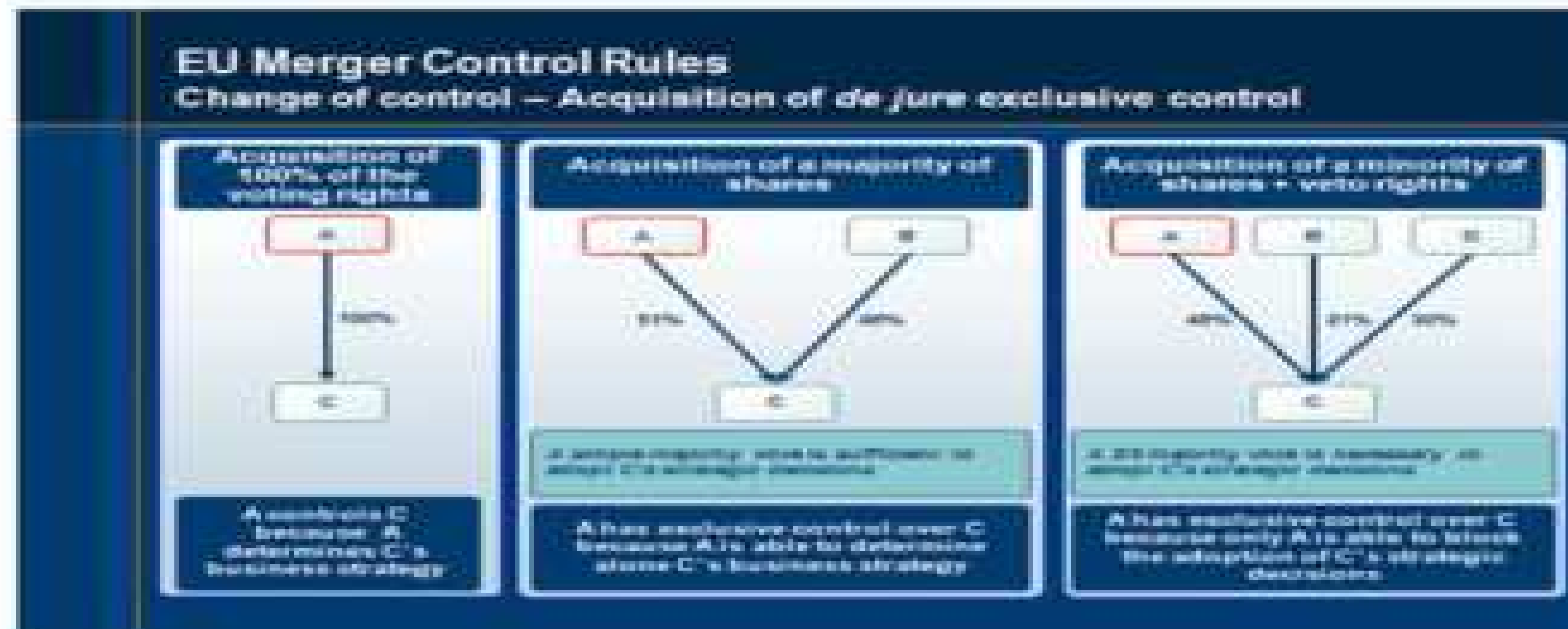
- **Conglomerate merger**: This happens when the two companies are in totally different line of business. This kind of merger mostly takes place in order to diversify and spread the risks, in case the current business stops yielding adequate returnds. Example: Samsung – the electronics giant also makes military hardware, apartments, ships – it also operates a Korean amusement park!

But what is a "Concentration"?

- **Mergers** = at least two previously independent undertakings amalgamate into a new undertaking (Daimler-Benz and Chrysler = Daimler Chrysler) or one undertaking is absorbed into another (Digital Computers and Compaq whereby Compaq absorbed Digital Computers)

Forms of Concentrations

- **Acquisitions of** (sole or joint) **control** = one or more undertakings acquire direct or indirect control of the whole parts of one or more other undertakings – e.g., by purchase of securities or assets, by contract,… (BP Amoco/Castrol by way of a public bid for all its share capital removing Castrol from the market)



Control can be exercised on a legal basis or even a de facto basis

- There are various factors which may be relevant in deciding whether de facto control exists. There may be de facto control where, for example:

➢ **A shareholder is highly likely to achieve a majority at shareholders' meetings, or if the remaining shares are widely dispersed.**

➢ **A minority shareholder has the right to manage the activities of the company and to determine its business policy.**

➢ **Minority shareholders have strong common interests which means that they would not in practice act against each other (this would give rise to joint, as opposed to sole, control)**

Control can be exercised on a legal basis or even a de facto basis

- Ameritech Corporation is a US corporation and provider of full-service communications and advanced information services. Tele Danmark is the national provider of telecommunications services in Denmark
- Ameritech acquired shares, amounting to 34% of the share capital of Tele Danmark. A subsequent capital reduction of the share capital of Tele Danmark would increase Ameritechís stake to 42%.
- Ameritech was de facto able to appoint half (6) of the members of the board of Tele Danmark and to appoint the chairman and vice-chairman, who have a casting vote.
- The parties argued that under these provisions, Ameritech would gain a de facto control over Tele Danmark, since :

➢ the rest of the shareholdings in Teledanmark will be widely dispersed. None of the remaining shareholders in Tele Danmark post transaction will hold a stake in excess of 7.5%.

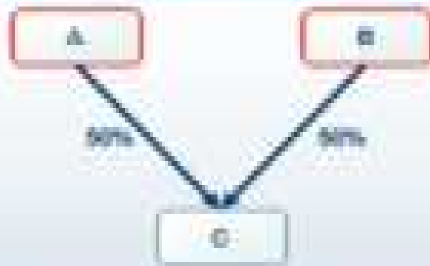
➢ in the last three years, attendance to the shareholders meetings has been below 54%, so Ameritech is expected to control a de facto voting majority at the shareholders meeting = Change of Control (de facto) = Concentration

Forms of Concentrations

- The creation of a **“full-function” joint venture** is also considered as a concentration (KIA – FIAT – OPEL = Cars International)

EU Merger Control Rules
Change of control – Acquisition of *de jure* joint control

Equality in voting rights



A and B jointly control C because they co-determine C's business strategy

Veto rights

A and B jointly control C because they each hold veto rights on C's strategic decisions

Joint exercise of voting rights

B and D jointly control C because they are able to impose together C's strategic decisions, despite the fact that A is the main shareholder

But what is the Concept of Control?

- **"Control" is defined as:** the ability to exercise decisive influence over an undertaking

- **Decisive influence on business strategy**

- appointment of key personnel and management (CEO, board members)
- validation of the annual budget
- validation and modification of the business plan
- decision regarding main investments

- **Means of decisive influence**

- holding a majority of the voting rights at shareholders meetings and/or other management bodies (de jure control)
- Acquisition of assets or on a contractual basis eg. Landing slots at Berlin Airport by Easyjet
- holding a minority shareholding with veto rights on strategic business decisions (de jure control) or holding a minority shareholding granting the possibility of having a veto on strategic business decisions due to factual elements such the number of other shareholders and/or their low participation (de facto control)
- Economic dependence eg. Long term supply contracts eg Coca-Cola US licensing agreement with UK bottling company

Microsoft/Yahoo! – Acquisition of Assets on a contractual basis COMP/M.5727

- The Commission's decision approving Microsoft's acquisition of Yahoo!'s Search Business (including internet search and search advertising) contains an interesting application of the definition of a concentration under the Merger Regulation.
- Microsoft and Yahoo entered into a License Agreement and a Search and Advertising Services and Sales Agreement (therefore no acquisition of shares/merger/ JV).
- Microsoft (i) will acquire a 10 year exclusive license to Yahoo!'s core search technologies and will have the right to integrate these technologies into its own web search platform. In addition, Microsoft (ii) agreed to hire more than 400 Yahoo! employees.
- Yahoo! will exclusively use Microsoft's search engines on Yahoo!'s sites, even though Yahoo! retains the right to design the user experience when presenting internet search results received from Microsoft.
- The Agreements do not cover any other aspect of the companies' businesses, so each company's web properties and products, email, instant messaging and display advertising will remain separate.
- Given that the business transferred is not incorporated, the Commission needed to investigate whether the agreement gives rise to a concentration, in that (i) the transferred assets constitute a business with a market presence to which a turnover can be attributed and (ii) there is a change of control over these assets on a lasting basis.

Microsoft/Yahoo! – the concept of a Concentration

- First, even though Microsoft does not acquire ownership over Yahoo!'s search technology, the Commission considered that a 10-year license is sufficient to be considered a transfer of assets, especially since the license is exclusive as to Yahoo! as well, in that Yahoo! will not be able to use its technology to operate a separate search business.
- Second, the facts that Microsoft will hire 400 Yahoo! employees and that all Yahoo! customers will be migrated to Microsoft further contribute to the Commission's conclusion that the agreements constitute a transfer of a business.
- Last, the business generates revenues which will now accrue to Microsoft, given that Yahoo! will be contractually obliged to exit the search and advertising markets.
- The 10-year duration of the agreements was considered sufficient to be considered a transfer on a lasting basis, given the relevant markets characterized by rapid technological developments and the fact that early termination of the agreements seem unlikely to occur.

The Commission concluded that as a result, Yahoo! is de facto definitively divesting its ability to compete in internet search and search advertising.

Specific Operations which are NOT a Concentration

- The Merger Regulation excludes the following categories of transactions from its application:

- Certain acquisitions of securities by banks and other financial institutions on a temporary basis (less than one year);
- Certain acquisitions of assets by a liquidator or other office-holder in the context of insolvency proceedings;
- Certain acquisitions by financial holding companies (that is, companies which hold shares for investment purposes only) (Article 3(5), Merger Regulation); and
- Intra-group restructurings (as there is no change of control between two separate undertakings, as defined in the Merger Regulation)

Specific Operations which are NOT a Concentration

LOMBARD

COMPANY ANNOUNCEMENT

The following is a Company Announcement issued by Lombard Bank Malta p.l.c. pursuant to the Malta Financial Services Authority Listing Rules.

QUOTE

Acquisition of Shareholding in Lombard Bank Malta p.l.c. (the 'Bank')

The Bank has today received notice that pursuant to a Share Purchase Agreement dated 16 March 2018, the National Development and Social Fund (the 'NDSF') has agreed to acquire from Cyprus Popular Bank Public Co. Ltd. ('CPB') 21,651,746 Ordinary Shares in the issued share capital of the Bank, representing 49.01% of the total issued share capital of the Bank (the "Acquisition").

The Acquisition is subject to:

- approval being granted by the MFSA in terms of the Banking Act for the NDSF to acquire the shares;
- confirmation from the Director General (Competition) under the Control of Concentrations Regulations (S.L. 379/08) ('the Concentration Regulations') before the Closing Date either that the proposed acquisition of the Shares under the Agreement does not fall within the scope of the Concentration Regulations or that it is a lawful concentration;

Specific Operations which are NOT a Concentration

The Board of Governors of the NDSF has confirmed to the Bank that:

- it does not intend to increase its holdings in the Bank;
- it shall not act in concert with any other shareholders;
- it will seek to reduce its proposed shareholding in the Bank in an orderly manner, at the right market conditions and by agreement with the regulatory authorities;
- it has no intention of exerting any influence on the operations of the Bank; and
- the Acquisition will not result in a change in control of the Bank.

UNQUOTE

Dr Helena Said LL.D.
Company Secretary

16 March 2018

Concept of Control (Recap)

- The definition of control is very broad. It is sufficient that one party acquires the possibility of exercising decisive influence over another company (Article 3(2), Merger Regulation).
- *Decisive influence* may arise by the ownership of all or part of the company's assets, or of rights which confer decisive influence on the decision-making process of the company (for example, by means of voting rights attached to shares, or contractual rights).
- Control can be exercised on a de facto or a legal basis, regardless of the size of the shareholding concerned. For example, a shareholding of 34% (which was to be increased to 42% by a capital reduction of the share capital) has been held to confer decisive influence (Case IV/M.1046 Ameritech/Tele Danmark).
- Sole control and joint control; Sole control exists where a single shareholder is able to exercise decisive influence over a company, whereas joint control arises where two or more shareholders together are able to exercise decisive influence.
- An acquisition of sole control will mean that there is a concentration in the form of a merger, while an acquisition of joint control means that the concentration is in the form of a joint venture.

Case No COMP/M.4994 - ELECTRABEL

Shareholding and Management – de Jure or de facto control?

Background

- In **2008**, *Electrabel*, a Belgian electricity company which is part of the French group, Suez, notified to the Commission a concentration consisting in the acquisition of *de facto sole control* over *Compagnie Nationale du Rhône* ("*CNR*"), the second largest electricity operator in France.
- One year later, the Commission found that Electrabel had actually acquired *de facto sole control* over CNR as from 23 December **2003** and it imposed a fine of EUR 20 million on Electrabel.
- Under the EU merger control system, a concentration with a Community dimension must be notified to the Commission **before** its implementation.
- In addition, such a concentration cannot be implemented both before and after notification **until it has been declared compatible**. This latter provision is also referred to as the 'suspension obligation' or 'standstill obligation' – See Article 4(1) and 7(1) of the EU Merger Regulation.
- In imposing a significant fine, the Commission sent out a clear message to the effect that violating the standstill obligation is, by its very nature, a serious infringement which undermines the effectiveness of Community provisions on the control of concentrations.

ELECTRABEL (cont.)

- Prior to the acquisition of shares by Electrabel in CNR, there were three main shareholder categories:

i. EDF
ii. CDC
iii. Public local entities

Shareholding

- On 23 December **2003**, when Electrabel acquired from EDF a number of shares in CNR, it increased its shareholding to approximately **50%** which effectively resulted in approximately **48%** of the voting rights
- The second main shareholder was Caisse des Dépôts et Consignations (CDC), a French public institution, which held 29.43% of the shares and 29.80% of the voting rights
- The remaining shareholding was very dispersed, since about 20% of the shares and the voting rights were shared between around 200 public local entities.

Management

- In addition, CNR's Board of Directors comprised **two representatives** of Electrabel out of three, thereby giving Electrabel a majority on the Board.
- This was facilitated by a **shareholder agreement** signed by CDC and Electrabel which provided that, inter alia, CDC and Electrabel would vote together when appointing the representatives at the Supervisory Board and at the Board of Directors of CNR.
- At the time, Electrabel was also the sole industrial shareholder of CNR and, as such, had **taken over the central role** previously held by EDF in the operational management of CNR's power plants and in the marketing of the electricity produced by CNR.

ELECTRABEL (cont)

- Therefore, although, Electrabel did not acquire *de jure sole* control over CNR since, inter alia, it did not acquire a majority of the voting rights of CNR, a minority shareholder can nevertheless acquire sole control on a *de facto* basis.
- The Commission considered that this is especially the case when the acquirer is highly likely to achieve a majority at the shareholders' meetings:

i. In accordance with the Commission's decision-making practice, the shareholders' meetings have to be analysed over a period of at least the past three years

ii. On the basis of the attendance rates at the shareholders' meetings of CNR of the preceding years and the fact that the remaining shares of CNR were widely dispersed, Electrabel – with 48% of the voting rights - was assured of a stable majority at the shareholders' meeting of CNR as from December 2003 (shareholding)

iii. In addition, the Commission noted that, already from December 2003, Electrabel had had the majority on CNR's Board of Directors, had been the sole industrial shareholder of CNR and, as such, had assumed the central role previously held by EDF in CNR (management)

All these elements constituted a body of evidence showing that Electrabel's de facto control over CNR had been easily foreseeable in December 2003

Standstill Obligation - Jumping the Gun

- There is a strict prohibition under the EUMR on putting a notifiable merger into effect before notification, and (subject to limited exceptions) completion cannot take place until the EC has issued a clearance decision. (known as "jumping the gun").

- The EC may, in exceptional circumstances, waive the requirement to suspend completion (for example, in case of the risk of imminent financial failure of the target company where the acquisition does not raise any material competition concerns) but such derogations from the suspensory period are rare and will not be given for reasons of "commercial convenience" (such as a desire to complete by a certain date for accounting reasons)

- In public bids, it is also possible to acquire the relevant shares prior to the grant of a clearance decision, provided that the transaction is notified to the EC without delay and the acquirer does not exercise the voting rights attaching to those shares until clearance has been obtained. These provisions are used primarily in jurisdictions (such as France) where a public bid cannot be made on a conditional basis.

Legislative provisions: standstill obligation and notification requirement

- Concentrations that fall within the EU Merger Regulation must be notified to the Commission before their implementation and following either:

i. Conclusion of the agreement.
ii. The announcement of the public bid.
iii. The acquisition of a controlling interest.

(Article 4(1).) - This is referred to as the **notification requirement**.

- Where a concentration meets the thresholds for notification under the Merger Regulation that concentration "shall not be implemented either before its notification or until it has been declared compatible with the [internal] market“

(Article 7(1)). This is referred to as the **standstill obligation**.

Legislative provisions: standstill obligation and notification requirement

- The notification requirement and the standstill obligation are considered cornerstones of the EU merger control system. They enable the Commission to carry out *ex ante* control of all concentrations with an EU dimension and allow for the maintenance of the existing competitive conditions until the Commission is able to assess the effect of the transaction.
- The distinction between cases imposing gun-jumping fines for failure to notify and those breaching the standstill obligation is not always clear. However, the ECJ has confirmed that Articles 4(1) and 7(1) are two distinct obligations that operate independently of each other, even though the breach of the former automatically results in an infringement of the latter (although the converse is not true) (Marine Harvest ASA v European Commission (Case C-10/18) EU:C:2020:149).
- The Commission can impose separate fines for breaches of the notification requirement and standstill obligation as the principle of concurrent offences applies only to the protection against the same conduct being assessed in repeat proceedings. The ECJ held that there was no "double punishment" inconsistent with the ne bis in idem principle of Article 50 of the Charter of Fundamental Rights of the European Union and with Article 4 of Additional Protocol No 7 to the European Convention on Human Rights.

Legislative provisions: standstill obligation and notification requirement

- Practice also makes it clear that parties should request from the Commission a derogation from the standstill obligation under Article 7(3) if they want to partially implement a notified transaction (Altice Europe NV v European Commission (T-425/18), ECLI:EU:T:2021:607).

- In Altice, the Commission concluded that Altice infringed both Articles 4(1) and 7(1) of the Merger Regulation, finding that Altice had acquired legal rights under a sale and purchase agreement, signed in December 2014, before the notification (in February 2015) and clearance of the merger under the Merger Regulation.
- These pre-closing rights gave Altice the possibility to exercise decisive influence over PT Portugal, for example, by granting Altice veto rights over decisions concerning PT Portugal's ordinary business. In certain cases, Altice actually exercised decisive influence over aspects of PT Portugal's business, for example, by giving PT Portugal instructions on how to carry out a marketing campaign and by seeking and receiving detailed, commercially sensitive information about PT Portugal outside the framework of any confidentiality agreement.

Gun Jumping – Breach of Notification and Stand-still Obligation

In April 2018, the EC imposed a gun-jumping fine of €124.5 million on the telecoms company Altice in relation to its acquisition of a telecoms operator, PT Portugal

- In her May 2017 speech on "Competition and the Rule of Law," Commissioner Vestager said that if merging parties "jump the gun, we take that very seriously indeed," because "otherwise, the harm to competition could already be done, before we have the chance to intervene."
- Rights granted in the transaction agreement allowed Altice to veto decisions and intervene in the target's business beyond what was necessary to preserve value, giving it the possibility to exercise *decisive influence* over PT Portugal. In particular, Altice's approval were both wide-ranging and operational in nature relating to:

i. the appointment of senior management;

ii. the target's pricing policies and standard offer prices; and

iii. the entering into a number of contracts which, due to the low qualifying monetary thresholds, captured many contracts relating to the ordinary course of PT s business.

But…Are preparatory acts by the merging firms prohibited?

Acquisition by EY's int. network of KPMG Denmark

i. On **18 November 2013**, the two auditing firms entered into a merger agreement and began pre-notification discussions with the Danish NCA. The transaction was notified on 7 February 2014 and **approved in May**.

i. In accordance with the merger agreement, immediately after its signature, KPMG Denmark gave notice to KPMG Int. to terminate their cooperation agreement with effect from 30 **September 2014**. The Danish NCA decided that KPMG Denmark's termination of the cooperation agreement constituted a premature implementation of the merger because this was a step to implement their merger before it was approved.

ii. According to the ECJ, a transaction has been implemented when there is a **change in control** of the target business. If a change in control takes place before the transaction is approved, the merging parties have "**jumped the gun**" on the prohibition on implementing the deal and are likely to be subject to a fine.

Acquisition by EY's int. network of KPMG Denmark

The ECJ found that the termination of the cooperation agreement did not result in a change in control, despite the effects that the termination may have had on the market.

Two facts regarding the co-operation agreement were particularly relevant:

i. First, the co-operation agreement did not give KPMG International control or decisive influence over KPMG Denmark. While the co-operation agreement gave KPMG Denmark the exclusive right to be part of the KPMG International network and to use the trade marks of KPMG, it was structurally separate both before and after notice of termination of the co-operation agreement.

ii. Second, EY did not gain any control of or influence over KPMG Denmark as a result of the termination of the co-operation agreement. The ECJ found that the termination of the cooperation agreement **did not result in a change in control**, despite the effects that the termination may have had on the market. The termination was likely **an ancillary and preparatory measure** for the transaction and not its implementation

Introducing JVs from a Merger Control Perspective

A. Two or more parties combine their resources to bid for the award of a contract to construct an infrastructure project. This may be an endeavour limited in time to the construction period, with usually no co-operation between the parties beyond the project itself. Though the parties may describe it as a joint venture, it will **not be regarded as a full-function joint venture under the EU merger control rules**

B. Two or more parties combine to undertake joint research and agree how they will respectively exploit the results. Although this type of arrangement may not take the form of a full-function joint venture for the purposes of the Merger Regulation **Article 101 may apply to arrangements (EU Collaborative agreements**)

C. Two or more parties combine to pool their activities in a particular field, often creating a new, jointly-owned corporate vehicle for the purpose, with its own management and access to sufficient resources (finance, staff, assets and so on) to enable it to conduct its activities on a lasting basis. This is known as a **full-function JV, and it will be assessed under the EU merger control rules if it has an "EU dimension**"

Key Issues: Concept of Joint Control

Definition of Joint Control:

- The Notice states that "joint control" exists when ***two or more*** *undertakings have the possibility of exercising* ***decisive influence*** *over another undertaking: the joint venture*. The essential feature of joint control is the possibility of a deadlock arising from the power of two or more parent companies to veto proposed strategic decisions, which effectively requires them to reach a common understanding in determining the commercial policy of the joint venture.

- If this situation does not exist, and instead one parent company can effectively take all the major decisions by itself, there is no joint control.

➢ The most straightforward example of joint control is where there are two participants with **equal voting rights** in the joint venture. In this situation, each participant exercises decisive influence over the joint venture, as the consent of both is required for any decisions to be taken (for example, CVC/Permira/AA (Case COMP/M.3517, 27 August 2004)).

➢ Joint control may also arise where the joint venture partners do not enjoy equal shareholdings, but decision-making is by **majority voting**. In Alba/Beko/Grundig, for example, all decisions had to be taken by majority voting pursuant to the shareholders agreement of the joint venture's partners. In practice, however, no decision could be taken without agreement between the board representatives of the joint venture's partners. In these circumstances, the Commission found that both parents had the possibility to exercise decisive influence over the joint venture, and so had joint control (Case COMP/M.3381, 29 April 2004).

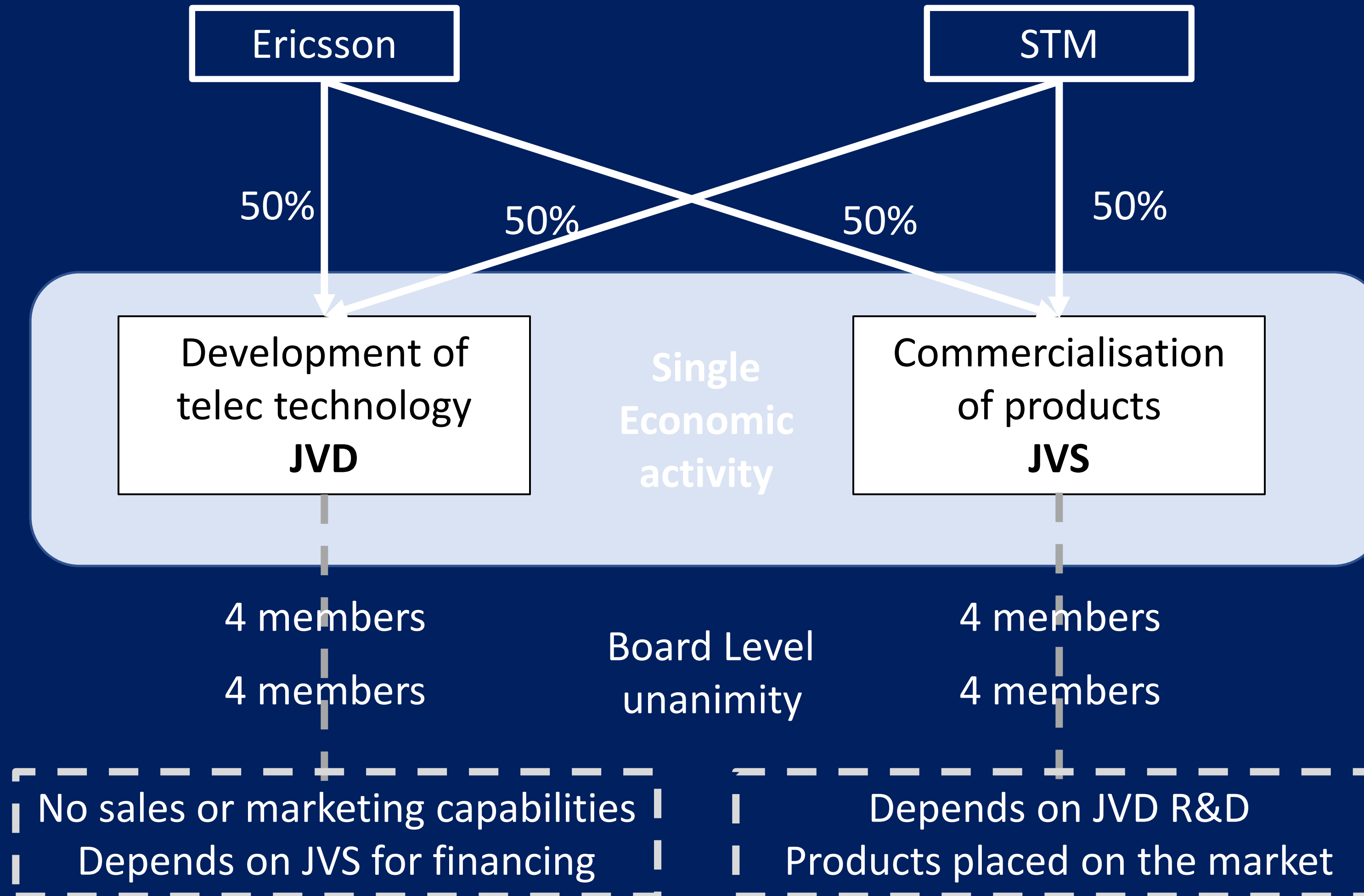
Concept of Joint Control

Concentration – Joint Control:

- In Case No COMP/M.5781 – Total Holdings Europe SAS/ ERG SPA/ JV: ERG held 51% and Total held 49% respectively. Pursuant to the **shareholders agreement** each shareholder would appoint respectively 3 members of the Board of Directors where decisions were validly taken with the affirmative vote of at least 4 Directors out of 6. A majority of 5 Directors would be instead required for the adoption of resolutions on reserved matters such as those relating to the approval of the business plan, budget etc.

- In Case No COMP/M.5936 – EADS DS/ ATLAS/ JV: EADS DS and Atlas held respectively 60 % and 40% of the shares in NewCo. Atlas would have additional rights which would allow Atlas **to veto decisions** on the strategic commercial behaviour of NewCo. Firstly, both EADS DS and Atlas would have the right to appoint senior management of NewCo. Secondly, a catalogue of decisions, among which approvals of the annual budget and the business plan, has to be unanimously approved by EADS DS and Atlas in the shareholders‘ meeting.

Case No COMP/M.5332 - ERICSSON / STM / JV



Key Issues: Concept of Fully Functioning

- As mentioned above, in order to qualify as a concentration a joint venture must perform "on a lasting basis all the functions of an autonomous economic entity" (Article 3(4), Merger Regulation).
- A joint venture which satisfies these requirements is referred to as a "full-function" joint venture. This is the case regardless of whether the joint venture is a wholly new operation or whether it is formed from assets that the parents previously owned separately.
- According to the Commission's Consolidated Jurisdictional Notice (the Notice), a joint venture will be full-function if it performs the functions normally carried out by an undertaking operating on the same market in which the joint venture operates. To achieve this, a joint venture must:

- Have **management** dedicated to its day-to-day operations and access to sufficient **resources**: assets, personnel and financial resources in order to operate its business activity independently;
- Have the ability to conduct its **own commercial policy**,
- Have activities that go **beyond one specific function** for the parents.
- Have no significant purchase or supply agreements between it and its parents which would undermine its **independent character**; and
- Be of a **sufficiently long duration** as to bring about a lasting change in the structure of the undertakings concerned.

Key Issues: Concept of Fully Functioning

Concentration – Fully Functioning: e.g. Have no significant purchase or supply agreements between it and its parents which would undermine its independent character

- In **Case M.5173 STM / NXP / JV** the JV obtained its raw materials, which represented up to 85% of the manufacturing cost of the product, from the parents. The parents had a first option to supply raw material, as long as it was on competitive market terms. The minimum percentage to be obtained from the parents would be gradually decreased. This notwithstanding, the JV was a full-function one, as it would have its own assembly, testing, sales, marketing and R&D teams and it was common in the sector to source raw materials from specialized manufacturers

- In **Case M.5479 Lenza / Teva / JV** the JV would have complete control over development of current and future products and would own the IPRs. However, in the initial stage the JV would rely on arm's length outsourcing contracts with its parents. The Decision did not specify how long that period was. However, the Commission noted that long lead times (6 to 8 years), high up-front investments and high risk of failure of R&D were characteristics of this industry and that outsourcing agreements were common. Hence, it can be inferred that it accepted a longer reliance on parents than 3 years so after the start-up period it would be free to conduct its own recruitment policy, acquire and develop facilities and make outsourcing agreements with the parents or third parties.

C-248/16 Austria Asphalt

Is there a concentration under the merger Regulation when there is a change from sole to joint control over an existing undertaking, only if the newly formed JV is full-function?

Background

- In 2015, Austria Asphalt and Teerag-Asdag (TA) notified a transaction to the Austrian NCA. Austria Asphalt intended to acquire 50% of the shares in an asphalt mix plant from its sole owner, TA.
- The business of the plant was limited to supplying goods to its current parent company - and, in future, to its two parent companies - and it does not otherwise have any significant presence on the market.
- **.Notifiable concentration?**

The Austrian Supreme Court had to decide whether the acquisition of joint control over the asphalt plant required notification to the EC. It referred the matter to the ECJ for a preliminary ruling on this point.

Preliminary Reference to the CJEU

- The CJEU found that the wording of Article 3 of the Merger Regulation is unclear on the referred question. Article 3(1)(b) EUMR states that a notifiable concentration arises where an undertaking acquires, on a lasting basis, "**direct or indirect control of the whole or parts of one or more other undertakings**". Under Article 3(4), the creation of a JV amounts to a concentration if, on a "lasting basis", it performs **"all the functions of an autonomous economic entity**". The Notified Transaction concerns a lasting change in control, seemingly falling under Article 3(1)(b). But it also relates to a JV, making it a notifiable concentration only if it is fully functional (Article 3(4) EUMR).

Forms of "Concentrations"

Article 3 of the Merger Regulation states that:

"Definition of concentration

(1). A concentration shall be deemed to arise where a change of control on a lasting basis results from:

(a) the merger of two or more previously independent undertakings or parts of undertakings, or

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

…………

(4). The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b)."

Case C-248/16 Austria Asphalt

- The CJEU interprets the "creation of a joint venture" of Article 3(4) to mean the creation of an undertaking controlled jointly by at least two undertakings, irrespective of whether the undertaking to be jointly controlled existed prior to its formation. According to the CJEU, a distinction based on whether or not the entity existed prior to the creation of the JV would lead to an unjustified difference in treatment.

- The CJEU held that the creation of a JV – regardless of whether created as a new undertaking or formed from a previously solely-controlled undertaking – is subject to the Commission's review only if such JV is full-function. In other words, the acquisition of a controlling stake by a third party in an existing non-full-function undertaking is not caught by the EU merger control regime

Key Issues: Concept of Fully Functioning

- As mentioned above, in order to qualify as a concentration a joint venture must perform "on a lasting basis all the functions of an autonomous economic entity" (Article 3(4), Merger Regulation).
- A joint venture which satisfies these requirements is referred to as a "full-function" joint venture. This is the case regardless of whether the joint venture is a wholly new operation or whether it is formed from assets that the parents previously owned separately.
- According to the Commission's Consolidated Jurisdictional Notice (the Notice), a joint venture will be full-function if it performs the functions normally carried out by an undertaking operating on the same market in which the joint venture operates. To achieve this, a joint venture must:

- Have **management** dedicated to its day-to-day operations and access to sufficient **resources**: assets, personnel and financial resources in order to operate its business activity independently;
- Have the ability to conduct its **own commercial policy**,
- Have activities that go **beyond one specific function** for the parents.
- Have no significant purchase or supply agreements between it and its parents which would undermine its **independent character**; and
- Be of a **sufficiently long duration** as to bring about a lasting change in the structure of the undertakings concerned.

Guidance from the EC's Decisional Practice

- Beyond the criteria set out by the EC in its Notice to determine whether a JV is *full-function* or not, the EC's decisional practice provides us with useful guidance that companies should bear in mind when creating a JV.

- The **documentation establishing the JV** such as agreement, shareholders' agreement, business plan, etc.**)**. In RSB / Tenex (case No. IV/M.90), the EC considered that the shareholders' agreement clearly showed a lack of full-function character insofar as it was written that the main purpose of the JV would be to provide services to one of the parents.

- The **economic context** in which the JV operates. The EU courts have ruled that it is appropriate to take into account the characteristics of the market on which a JV operates in order to assess the degree of autonomy it enjoys in relation to its parent companies (case T-87/96). In Mannesmann / Hoesch (case No. IV/M.222,), the EC considered that a JV that was dependent on its parent companies for the supply of steel could still be considered as being full-function because vertical integration in the steel industry is normal and, to a certain extent, necessary.

- The JV's **access to resources**. The EC has made it clear that it is not necessary for a full-function JV to actually own the resources necessary to its operation so long as they are "accessible" to the JV (see case No. COMP/JV.19). This may for example take the form of an exclusive access to the parent companies' production units (see case No. COMP/M.3506,).

Resources:

- A full-function joint venture must have sufficient assets, personnel and financial resources in order to perform its business independently of its parents. It must, in essence, be a self-sufficient entity from the operational point of view.
- An example of a case in which this requirement was found to be satisfied is Hitachi/NECDRAM/JV (Case Comp JV/44, 3 May 2000). In this case, the Commission considered that a joint venture, the functioning of which would be implemented in three stages over a period of at least two years, was full-function. This was because at the end of this period the joint venture would have established an independent sales channel, would have exclusive use of its own brand and access to the necessary intellectual property rights. In addition, the joint venture would have all the necessary resources to operate as an autonomous economic entity, including assets, staff and finances.

Independent From Parents:

- A joint venture will not be full-function if it only takes over a specific aspect of a parent company's business, such as R&D or production, or if the joint venture's function is limited to the distribution of a parent company's products (Case IV/M.58 Baxter/Nestle/Salvia, 6 February 1991).

- In **Toray/Murata/Teijin,** the full-functionality of the joint venture was not in issue even though the parent companies did not transfer all aspects of their operations related to the relevant business to the joint venture at the time of its creation. The marketing, sales and R&D activities of the parents were transferred at once, together with the relevant resources to carry on these activities. The parents further agreed to transfer their manufacturing activities to the joint venture company within one year of its incorporation. Dismissing the parent companies' arguments that the joint venture would attain full-functionality only at a future date when the manufacturing operations were transferred, the Commission found that it sufficed that the joint venture's parents had already agreed upon the principle of transferring the remaining assets required for a full-function joint venture.

- Particular issues may arise where the joint venture is involved in holding real estate property and has principally been established for tax reasons. Such a joint venture will not usually be considered to be full-function as long as its purpose is limited to the acquisition or holding of real estate for its parents, using finances provided by the parents: it will lack an autonomous, long term business activity and will also lack the necessary resources to operate independently (paragraph 96, Consolidated Jurisdictional Notice).

Commercial Relationship with Parent:

- In deciding whether a joint venture is full-function, the Commission takes into account the existence of any commercial relationship between a joint venture and its parents, who may be important trading partners of the joint venture, either as suppliers or as customers.
- In its Consolidated Jurisdictional Notice, the Commission accepts that the joint venture may initially have to sell almost exclusively to its parents, or rely on purchases from them, in order to establish itself on the market, and indicates that this will not normally undermine the full-function status of the joint venture as long as the trading period does not exceed three years. This three-year time limit is not, however, set in stone and will depend on the specific conditions of the market in question.
- For example, in Siemens/Italtel (Case IV/M.468, OJ 1995 L161/27), the Commission accepted that all the joint venture's sales would be to a subsidiary of one of its parents for the "foreseeable future": the joint venture was still found to be full-function because the subsidiary was the joint venture's only potential customer, as it had a monopoly on the market for telecommunications infrastructure in Italy.

Commercial Policy:

- A full-function joint venture must be free to determine its own commercial policy in its own interests. The commercial policy of the joint venture must not simply represent the commercial aspirations and needs of the parent companies. However, the Commission recognises that it is not necessary that the joint venture enjoys full autonomy as regards the adoption of its strategic decisions. If this were the case then no jointly controlled undertaking could ever be considered to be full-function. It is sufficient that the joint venture is autonomous operationally (see para 93, Consolidated Jurisdictional Notice).
- When Carlsberg and Allied Lyons UK amalgamated their brewing and beer wholesale activities through the creation of a 50/50 joint venture known as Carlsberg-Tetley, the Commission found that this did not constitute a full-function joint venture, since Carlsberg and Allied Lyons were to retain ultimate ownership of their beer brands and would have a final say in the joint venture's commercial policy. Carlsberg-Tetley would therefore not be an autonomous economic entity (Carlsberg/Allied Lyons, 22nd Report on Competition Policy (1992)).

Duration:

- A joint venture must be intended to operate on "a lasting basis" in order to be full-function. Many joint ventures are established for an indefinite period and, as such, will satisfy this requirement. Provision may be made in the joint venture agreement for termination upon the occurrence of certain events, such as failure of the joint venture or fundamental disagreement between the parent companies, without affecting the full-function status of the joint venture.

- A joint venture established for a fixed period can still be on a lasting basis where the period is sufficiently long in order to bring about a lasting change in the structure of the undertakings concerned or where there are provisions for the continuation of the joint venture after the expiry of such period.

- For example, in **Eastman Kodak/Sun Chemical** (Case IV/M.1042), the joint venture was initially established for a period of only ten years, but this was still found to be on a lasting basis as there were automatic options to renew the agreement for further periods of five years.

- A period of seven years was considered sufficient in Go-Ahead/Via/Thameslink (Case IV/M.901, 24 April 1997). Similarly, in Smith & Nephew/Beierdorf/JV (above), the Commission found that a joint venture that was established for an initial term of more than seven years and automatically renewable for successive terms of more than two years was established on a lasting basis

Case M.9802 - LIBERTY GLOBAL / DPG MEDIA / JV

Full-functionality?

- Both Parties will contribute to the JV certain content agreements and staff so as to allow the JV to be (both financially and operationally) self-sustaining (through the revenues deriving from its operations with third parties and its own borrowing capacity on the market).
- The JV is intended to operate as an autonomous entity and will have its own, independent access to and presence on the markets for (wholesale and retail) supply of SVOD services.
- Its activities will not be limited to the distribution or sale of its parent companies' products, as the JV will supply its own SVOD offering to end customers, as a fully independent company with its own personnel (20-25 employees).
- In addition, the JV has negotiated and/or will negotiate agreements with its parents (e.g. a wholesale agreement and IT/back-end services agreement with Telenet; and a long-form video platform agreement with DPG Media) on an arm’s length basis, reflecting the normal market conditions it practices with third parties.

Case M.9802 - LIBERTY GLOBAL / DPG MEDIA / JV

The Transaction will lead to the creation of a full-function joint venture within the meaning of Article 3(4) of the Merger Regulation?

- Third, the JV and will not only purchase from and/or supply to its own parents. It will have direct contractual relationships with third party licensors and will not be reliant on its parents for licensing relationships. It will also commission original productions from TV production studios, the majority of which will be sourced from third party TV production studios. In addition, the JV will source additional and new SVOD licenses to content mainly from third party content providers.
- Finally, the JV is intended to operate on a lasting basis. Due to applicable corporate law restrictions, the shareholders agreement currently has a duration of [Details of the JV shareholder agreement].
- JV will employ its own management dedicated to its day-to-day operations, and have access to sufficient resources, including finance, staff and assets that will enable it to operate independently on the market for the retail supply of audiovisual ("AV") services, performing the functions normally carried out by undertakings operating on the same market.

Recap: Joint Control

- Therefore, if the Merger Regulation is to apply to a joint venture, three conditions must be satisfied:

- There must be an acquisition of **joint control** by two or more independent undertakings;
- The joint venture must perform all the functions of an autonomous economic entity on a lasting basis; in other words, it must be a **full-function joint venture**; and
- [The joint venture must have an EU dimension (that is, the relevant turnover thresholds must be met)].

Joint Control: Substantive Review

- Any substantive review will assess the consequences of the combination of the contributed resources on competition, and the scope for any anticompetitive implications outside the joint venture:

- Will any combination of resources distort competition? The Commission will assess the implications for competition from the aggregation of any assets being contributed to the joint venture . Conversely, where the contributed resources are complementary, there may be less scope for adverse effects on competition and/or greater scope for efficiencies that ultimately benefit consumers.
- Will the parents' participation in the joint venture distort broader competition between them? In some circumstances, the collaboration may reduce the ability or incentive of the parents to meaningfully compete or even provide a forum for coordination between their other activities (known as spill-over effects).
- Will the joint venture generate efficiencies that may benefit consumers?
- What would have happened absent the joint venture? Would the contributed resources have been viable on a stand-alone basis or would it have been possible for any efficiencies to have been achieved in other ways?

Is there a change in control?

No

Yes

Does the change result in an establishment or acquisition of joint control?

No

Yes

Does the change result in an acquisition of sole control?

No

Yes

Is the joint venture full-function?

No

Yes

Is there a merger between two or more previously independent undertakings?

No

Yes

Is there an EU dimension?

Yes

No

Is there an EU dimension?

No

Yes

Merger Regulation does not apply. National competition rules may apply. Article 101 may apply, but the Commission will not (generally) seek involvement.

Does the joint venture also have co-operative elements?

No

Yes

Merger regulation applies

Merger Regulation that applies and Article 101 test applies to the co-operative elements under Merger Regulation procedure.

Merger Regulation does not apply. Article 101 and national competition rules may apply.

Jurisdictional Elements – "Community Dimension"

- Concentrations are of a "Community dimension" either where (the "undertakings concerned"):

- The combined aggregate *worldwide turnover* (in the preceding financial year) of all the undertakings concerned exceeds EUR5 billion; and
- The aggregate *Community-wide turnover* of each of at least two of the undertakings concerned exceeds EUR250 million

➢ Where these thresholds are not met, the secondary thresholds apply and are satisfied if all of the following criteria are fulfilled:

- The combined aggregate worldwide turnover of all the undertakings concerned exceeds EUR2.5 billion
- In each of at least three member states, the combined aggregate turnover of all the undertakings concerned exceeds EUR100 million
- In each of those three member states, the aggregate turnover of each of at least two of the undertakings concerned exceeds EUR25 million
- The aggregate Community-wide turnover of each of at least two of the undertakings concerned exceeds EUR100 million

➢ As an exception, the Merger Regulation does not apply if a merger has its primary impact within a single Member State. This is deemed to be the case where more than two-thirds of the Community turnover of each of the parties involved in the merger is in one and the same Member State. This is known as the "two-thirds rule".

Jurisdictional Elements – "Community Dimension"

- All concentrations with a **Community dimension**,, **must be notified** to the Merger Registry of DG Competition prior to implementation of the concentration and following :

➢ Conclusion of the agreement;

➢ Announcement of a public bid; or

➢ The acquisition of a controlling interest (Article 4(1), Merger Regulation).

- Prior to 1 May 2004, the notification had to be made within **one week** of the above events. In practice, however, the Commission often granted the parties permission to submit Form CO later than the prescribed one-week period and so it decided to remove this time limit from the 2004 Merger Regulation.
- To provide greater flexibility (and to clarify earlier procedures), the Merger Regulation now expressly permits notifications to be made where the undertakings can demonstrate a "good faith intention" to conclude an agreement or to make a public bid (the intention to make a bid must have been publicly announced).

Jurisdictional Elements – "Malta Dimension"

- Concentrations must be notified in Malta where (the "undertakings concerned"):

- The combined aggregate turnover in Malta of the undertakings concerned exceeded EUR2,329,373.40 in the preceding financial year;

AND

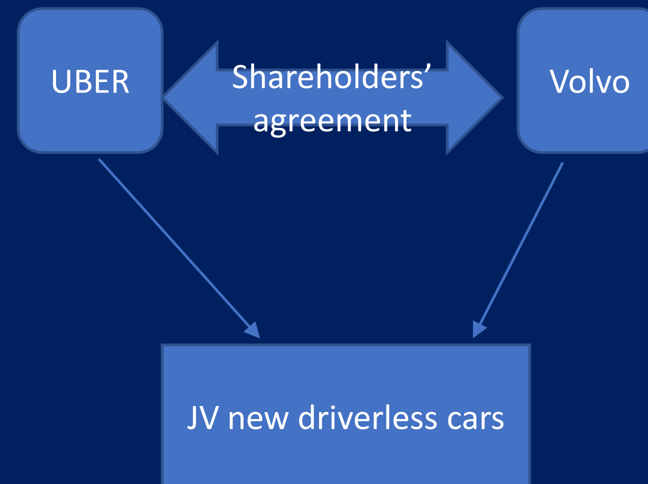
- Each of the undertakings concerned had a turnover in Malta equivalent to at least 10% of the combined aggregate turnover in Malta of the undertakings concerned in the preceding financial year.

= notification is mandatory ex ante

c1
100 %
c
c
100 %
d
50 %
50 %
a
51 %
51 %
100 %
b
b
b
x
100 %
100 %
50 %
50 %
50 %
50 %
b1
b2
e
b3

Jurisdictional Elements – "Malta Dimension"

- A joint venture is the joint venture between the taxi giant UBER and the heavy vehicle manufacturer Volvo. The joint venture goal was to produce driverless cars The ratio of ownership is 50%-50%.



Uber = 35 million
Volvo = 26 million
10% of 61 million = 6.1M
Notification required ex ante

Uber = 980k
Volvo = 26 million
10% of 26.98 million
= 2.6 M
Notification not required

The undertakings concerned (in this example) are, (i) UBER and (ii) Volvo. The JV is not an undertaking in that it doesn't have turnover and therefore it is excluded from the turnover calculation

Quick example Substantive Assessment: T-Mobile Austria/tele.ring

The Relevant Market: A single national Austrian market existed for the provision of mobile telephony services to end customers, in so far as they could be provided on both a 2G and a 3G basis.

Operator	2005	2004	2003	2002
Mobilkom	[35-45] %	[35-45] %	[40-50]%	[40-50]%
T-Mobile	[20-30] %	[20-30] %	[20-30]%	[45-35]%
Tele.ring	[10-20] %	[10-20] %	[5-15]%	[<5]%
T-Mobile/Tele.ring combined	[30-40]%	[30-40]%	[30-40]% [	[30-40]%
ONE	[15-25]%	[15-25]%	[15-25]%	[15-25]%
H3G	[<5]%	[<5]%	[<5]%	0%

Market shares: tele.ring's market shares more than doubled whereas T-Mobile's and Mobilkom's shares decreased significantly and ONE's market share remained stable. The Commission concluded that the development of the market shares indicating that tele.ring played a very active role in the last years whereas Mobilkom, T-Mobile and ONE remained rather passive.

Quick example: T-Mobile Austria/tele.ring

- **The Commission Assessment**

➢ Market share data suggested that a large proportion of customers who left T-Mobile and Mobilkom became tele.ring's customers. The analysis clearly indicated that tele.ring exerted the strongest competitive pressure in the market, in particular on Mobilkom and T-Mobile.

➢ Therefore, limited customer switching between the merged entity and Mobilkom.

➢ The price analysis showed that tele.ring was the provider offering the cheapest tariff most frequently, followed by H3G, whereas T-Mobile, Mobilkom and ONE offered the lowest prices in considerably fewer cases. Tele.ring was The Maverick

➢ Unlikely that H3G would be able to discipline the competitive behaviour of the merged entity and Mobilkom:

difficult to obtain full network coverage given the increasing difficulties to find locations for additional mobile telephony sites in Austria due to heightened environmental concerns and planning requirements. In addition, H3G's limited frequency spectrum (compared to its competitors) severely limited its capacity. The Commission therefore concluded that H3G would not have the ability to act in the future as a constraining force for the other mobile operators in a similar way as tele.ring in the past;

Quick example: T-Mobile Austria/tele.ring

- Unlikely that ONE/YESSS! would be able to discipline the competitive behaviour of the merged entity and Mobilkom.

the Commission concluded that due to its very limited services and its focus on pre-paid customers YESSS! could not be considered to be a competitive constraint similar to tele.ring and would not be an alternative for customers of tele.ring with its very high share of postpaid customers and its services limited to voice telephony

Therefore was there a Gap?: Despite the fact that TMobile would not be the biggest operator in terms of market shares after the operation, the elimination of tele.ring as independent operator would lead to *non-coordinated effects* and to a significant effect on prices

The Commission Conclusion:

- both Mobilkom and Tele.ring/T-Mobile could unilaterally increase prices in the post-merger market. Due to the elimination of the maverick in the market, it would be likely that the transaction would produce non-coordinated effects and SIEC. For this conclusion, the Commission referred to the Horizontal Guidelines which state that some firms have more of an influence on the competitive process than their market shares would suggest. A merger involving such a firm could change the competitive dynamics in a significant anti-competitive way, in particular when the market is already concentrated.

Diploma in Law (Malta)

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